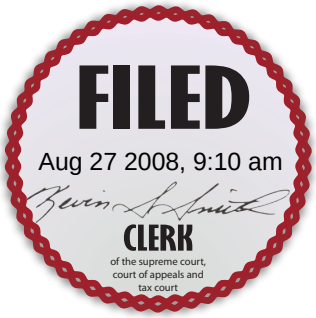

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IN THE
COURT OF APPEALS OF INDIANA

CHARLES W. CHORPENNING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A04-0804-CR-242
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause Nos. 57D01-0703-FD-54
57D01-0704-FD-76
57D01-0704-MR-1

August 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Charles Chorpenning pled guilty to murder and six other felonies and admitted to being an habitual offender. The trial court subsequently sentenced him to an aggregate of one-hundred years, and ordered that he pay restitution in the amount of $19,386.89. Chorpenning appeals his sentence, arguing that it is inappropriate given the nature of his offenses and his character; and his restitution order, arguing that the evidence does not support it. Concluding that Chorpenning's sentence is not inappropriate, we affirm his sentence. However, we reverse the restitution order and remand with instructions.

Facts and Procedural History

This appeal involves three separate incidents, charged under three cause numbers, but consolidated pursuant to Chorpenning's plea agreement.

I. Cause No. 57D01-0704-MR-001 ("MR-1")

On March 5, 2007, Chorpenning and Lionel Cox, Jr., arrived in Kendallville, Indiana, stole some zip ties, and purchased some duct tape. They then broke into Patrick Biddle's apartment, bound his legs with the zip ties, beat him, and strangled him. Biddle died from the strangulation. After killing Biddle, they took Biddle's car and some items from his apartment. Chorpenning told officers that he "believed Biddle to be a child molester and that he wanted to punish him." Transcript at 72. Detective Lance Waters, of the Kendallville Police Department, testified that Biddle had never been charged with any such crime, that he had never received complaints of such nature involving Biddle, and that he did not find anything in Biddle's apartment that would corroborate such an allegation.

On April 5, 2007, the State charged Chorpenning with murder, a felony; burglary, a Class B felony; confinement, a Class D felony; theft, a Class D felony; and auto theft, a Class D felony. On June 21, 2007, the State filed its notice of intent to seek a sentence of life without parole. On July 12, 2007, Chorpenning filed his notice of defense of mental disease or defect. On July 18, 2007, the State filed an information alleging that Chorpenning was an habitual offender.

II. Cause No. 57D01-0703-FD-054 ("FD-54")

On March 9, 2007, Chorpenning went to his ex-girlfriend's house and demanded that she let him in the house. After she refused, Chorpenning threatened to kill everyone in the house. He then kicked the door and knocked over a moped parked in the driveway. On March 12, 2007, the State charged Chorpenning with intimidation, a Class D felony; trespass, a Class A misdemeanor; and criminal mischief, a Class B misdeanor.

III. Cause No. 57D01-0704-FD-076 ("FD-76")

On March 12, 2007, Chorpenning stole a vehicle parked at a gas station. Officers attempted to pull over Chorpenning, but he refused to stop and led the police on a high-speed chase. The chase ended when Chorpenning wrecked the vehicle. On April 5, 2007, the State charged Chorpenning with auto theft, a Class D felony; and resisting law enforcement, a Class D felony.

IV. The Plea Agreement and Sentencing

On December 4, 2007, Chorpenning entered into a plea agreement. Under FD-54, Chorpenning agreed to plead guilty to intimidation, and the State agreed to drop the charges of trespass and criminal mischief. Under FD-76, Chorpenning agreed to plead

guilty to auto theft and resisting law enforcement. Under MR-1, Chorpenning agreed to plead guilty to murder, burglary, theft, and auto theft, and to admit to being an habitual offender. The State agreed to dismiss the confinement charge and its intention to seek life without parole. The State also agreed that if Chorpenning remained incarcerated at the age of sixty-two, he would be permitted to request the court to modify his sentence. The agreement further provided that the parties would be free to argue the appropriate sentence for each count and to which felony in MR-1 the habitual offender enhancement would attach. The parties agreed that the sentence for MR-1 would run consecutive to the sentences under the other cause numbers, but that a sentence under FD-54 could run consecutive to or concurrent with a sentence under FD-76.

After his arrest, Chorpenning underwent psychological evaluations. Both a psychologist and a psychiatrist determined that Chorpenning was not mentally retarded and that he was competent to stand trial. Francis Cyran, MD, submitted an evaluation stating:

> I believe at the time of the alleged offenses Mr. Chorpenning suffered from Delusional Disorder, Paranoid Type, which caused him to be unable to appreciate the wrongfulness of his conduct. I am confident that Mr. Chorpenning knew his actions were illegal. He, however, believed his behavior to be morally right and an answer from God to his prayers. . . . I find only one detail that would have me question the veracity of Mr. Chorpenning's story. He volunteered that he had not told his accomplice the "spiritual" nature of his beliefs about Mr. Biddle because he would probably not get the assistance he needed to carry out his plan.
>
> I was unable to obtain an autopsy report which I believe could contain information pertinent to the issue of truthfulness.

Appellant's App. at 148(a). James A. Cates, Ph.D., ABPP, submitted the following assessment of Chorpenning's sanity at the time of the offense:

> Was Mr. Chorpenning sane or insane at the time at which he is alleged to have committed the offense?
>
> Sane. Mr. Chorpenning exhibits both clinical syndromes and a personality disorder which qualify as mental disorders. However, they did not preclude his understanding of right and wrong. Rather, the belief that he was acting as an agent of God, if indeed Mr. Chorpenning believed that this was so, appeared to be an appeal to his underlying narcissism, rather than a delusion which robbed him of the ability to think rationally. His repeated questioning of God regarding what he was preparing to do, and his preparations to assure that he had time to escape human punishment also suggest that he understood that human retribution, if not divine retribution, awaited the results of his actions; this is further suggestion that he had an understanding of right and wrong, and was not fully convinced of the authority under which he acted. Of further concern, although peripheral, is the theft of a car and his actions in this regard if his behavior, as he said, was truly divinely motivated.

Id. at 124 (m-n).

On March 4, 2008, the trial court held a sentencing hearing. The trial court made the following statement regarding mitigating circumstances:

> The Court now finds the following mitigating circumstances applicable to the Defendant in each case herein. a) In spite of the senselessness of the Defendant's crime, most specifically the murder of Mr. Biddle, the Court believes that the Defendant is remorseful. However, the Court does not believe that the Defendant's remorse is such that he will not reoffend upon being released back into society. b) The Defendant has pled guilty and has spared the State, Mr. Biddle's family, and the Court from the rigors of a trial. The Defendant has also cooperated and assisted the State in the case against his co-defendant in MR-001. c) As explained by Dr. Cates in his evaluation of the Defendant, "Mr. Chorpenning exhibits both clinical syndromes and a personality disorder which qualify as mental disorders," but the Defendant's psychological and emotional issues, although they may tend to explain or put his crimes into context, nevertheless . . . fail to excuse the Defendant's behavior or establish a defense. d) The Court acknowledges that the Defendant has had a very difficult childhood, but that at most is a very minimal mitigating circumstance.

Tr. at 100-01. The trial court made the following statement regarding aggravating circumstances:

> a) The Defendant's prior criminal history, both as a juvenile and as an adult is abominable. . . . The Defendant's criminal record clearly shows that he is the worst of the worst and must be removed from society for a substantial period of time in order to protect the innocent citizen's [sic] from the Defendant. . . . b) The Court further finds the Defendant committed the instant offenses while on probation . . . . c) A sentence less than the enhanced term of imprisonment would depreciate the seriousness of the crimes.

Id. at 101-02.

Under FD-54, the trial court sentenced Chorpenning to two and one-half years for intimidation. Under FD-76, the trial court sentenced Chorpenning to two and one-half years for both auto theft and resisting law enforcement, to be served concurrently. Under MR-1, the trial court sentenced Chorpenning to sixty years for murder, enhanced by thirty years because of his status as an habitual offender, twenty years for burglary, and two and one-half years for both theft and auto theft. The sentence for burglary was to run concurrent with the murder sentence, and the other sentences were to run consecutively. The sentences under the three cause numbers were to be served consecutively, for an aggregate sentence of one hundred years. Chorpenning now appeals.

Discussion and Decision

I. Appropriateness of the Sentence

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on reh'g, 875 N.E.2d 218. When reviewing a

sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Nature of the Offenses and Chorpenning's Character

Here, the trial court imposed sentences above the advisory, but below the maximum, for each offense. Specifically, the sixty-year sentence for murder falls halfway between the fifty-five-year advisory and sixty-five-year maximum sentence. See Ind. Code § 35-50-2-3. The two and one-half-year sentences for the Class D felonies fall one year above the one-and-one-half-year advisory sentences, and six months below the three-year maximum sentences. See Ind. Code § 35-50-1-7. Although the trial court was not required to attach the habitual offender enhancement to the murder conviction, once it did so, the thirty-year enhancement was mandated by statute. See Ind. Code § 35-50-2-

7.1(h). Additionally, the trial court ordered the maximum twenty-year sentence for burglary and one Class D felony sentence to run concurrent with other sentences.

As to the nature of the offenses, we have little information in the record regarding those committed under FD-54 or FD-76. However, we do note that Chorpenning's offenses of resisting law enforcement and auto theft under FD-76 caused a substantial risk of injury to others, as Chorpenning led officers on a high-speed chase, at times reaching 120 miles-per-hour.

In regard to Chorpenning's murder of Biddle, we note that the crime appears to have been committed in a particularly brutal manner, as Chorpenning and his accomplice bound Biddle, and then beat and strangled him to death. See Spinks v. State, 437 N.E.2d 963, 968 (Ind. 1982) ("The record reflects that [the defendant] strangled the victim in a most brutal and vicious way."), disapproved of on other grounds, McCraney v. State, 447 N.E.2d 589 (Ind. 1983). This brutal nature supports a conclusion that the trial court's sentence is not inappropriate. See Hightower v. State, 422 N.E.2d 1194, 1197 (Ind. 1981) (affirming a sentence above the presumptive based on the aggravating circumstance that the crime was "particularly and exceptionally brutal in its nature"); Roney, 872 N.E.2d at 207 (noting the brutal nature of the offense in concluding a maximum sentence for murder was not inappropriate). We also note that Chorpenning committed the murder after breaking into Biddle's house, "a place representing as it does a place of security in the minds of most." Johnson v. State, 687 N.E.2d 345, 347 (Ind. 1997).

In regard to Chorpenning's character, we recognize that he has suffered from mental illnesses. Our supreme court has identified four factors that should be considered

when considering a defendant's mental illness and its effect on sentencing: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005) (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)), trans. denied. We have previously concluded that a defendant with no criminal history "who is suffering from a severe, longstanding mental illness that has some connection with the crime(s) for which he was convicted and sentenced is entitled to receive considerable mitigation of his sentence." Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied. On the other hand, where a defendant is "capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense," mental illness should not be as significant a factor for sentencing. Scott v. State, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006) (concluding that defendant's mental illness should have been given little weight), trans. denied.

Here, it appears that Chorpenning has established some sort of nexus between his illness and the commission of the crimes relating to the murder of Biddle. However, the two reports submitted on this point put forth different conclusions regarding the strength of this nexus, and Chorpenning's ability to control his actions. Further, Dr. Cyran's report indicates some doubt as to the veracity of Chorpenning's statements and that Dr. Cyran's inability to obtain the autopsy report hampered his review. We also note that the reports indicate that these disorders did not significantly limit Chorpenning's overall

functioning. In sum, Chorpenning's mental illness does have some effect on our analysis of his character.[1]

We also note that Chorpenning pled guilty and expressed remorse for his actions. See Cloum v. State, 779 N.E.2d 84, 90 (Ind. Ct. App. 2002) (recognizing the mitigating nature of a defendant's guilty plea). Chorpenning received a benefit in return for his plea, as the State agreed to withdraw the possibility of life without parole. Cf. Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"), trans. denied. We note that Chorpenning still received a substantial sentence, and that the benefit he received for his plea is debatable. However, his current sentence does allow Chorpenning the possibility of being released from prison, albeit in the distant future. In sum, Chorpenning's guilty plea has some positive effect on our analysis of his character.[2]

We now turn to Chorpenning's criminal history, which the trial court described as "abominable." Tr. at 101. This history consists of three juvenile adjudications, all involving charges of theft or criminal conversion. As an adult, Chorpenning has felony convictions of burglary, residential entry, theft, auto theft, receiving stolen property, obstruction of justice, and resisting law enforcement; and misdemeanor convictions of resisting law enforcement, criminal conversion, theft, possession of marijuana, three counts of operating while never having received a license, and minor consumption.

[1] We note that the trial court also found Chorpenning's mental illness to be a mitigating circumstance, and thus considered it when determining what it believed to be an appropriate sentence.

[2] Again, we note that the trial court found Chorpenning's guilty plea to be a mitigating circumstance.

Although this criminal history does not contain any convictions as serious as murder, several of the charges involve illegal entry into another's home, actions that inherently involve the risk of violence. See N.W. v. State, 834 N.E.2d 159, 165 n.5 (Ind. Ct. App. 2005) (recognizing that burglary is inherently dangerous), trans. denied. Also this criminal history is substantial – particularly when considering that Chorpenning was twenty-seven at the time of his instant offenses – and recent, as the last conviction came within two years of the instant offenses. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability").

Additionally, Chorpenning has had probation terminated unsatisfactorily, and committed the instant offenses while on probation, which he was returned to after violation found two weeks prior to the commission of the instant offenses. See Ryle v. State, 842 N.E.2d 320, 325 n.5 (Ind. 2005) ("While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence."), cert. denied, 127 S.Ct. 90 (2006). The fact that Chorpenning committed these offenses while on probation is a substantial consideration in our assessment of his character. Cf. Barber v. State, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007) (holding that even if the other aggravating circumstance was insignificant, the trial court would have acted within its discretion in

ordering maximum sentences based on the fact that the defendant committed the crime while on probation), trans. denied.

In sum, we recognize that Chorpenning suffers from mental illnesses and took some responsibility for his actions, but we also recognize the brutal nature of the murder and Chorpenning's substantial criminal history. After giving due consideration to the trial court's sentencing decision, we conclude that Chorpenning has not met his burden of persuading this court that his sentence is inappropriate.

II. Restitution

A restitution order must be supported by sufficient evidence of actual loss sustained by the victim or victims of a crime. See Lohmiller v. State, 884 N.E.2d 903, 916 (Ind. Ct. App. 2008). "The amount of actual loss is a factual matter that can be determined only upon the presentation of evidence." Bennett v. State, 862 N.E.2d 1281, 1287 (Ind. Ct. App. 2007). We review a trial court's order of restitution for an abuse of discretion. See Bailey v. State, 717 N.E.2d 1, 4 (Ind. 1999). We will affirm the trial court's order if sufficient evidence exists to support its decision. Creager v. State, 737 N.E.2d 771, 779 (Ind. Ct. App. 2000), trans. denied.

The trial court ordered that Chorpenning pay restitution in the amount of $19,386.89 to State Farm for the value of the stolen vehicle Chorpenning wrecked. State Farm submitted a letter to the trial court indicating that the total damage to the vehicle was $19,386.89, that State Farm had paid $18,886.89, and that the vehicle's owner had been assessed a deductible of $500.00. State's Exhibit C. Although the State surmises that "the portion of restitution covering the deductible will likely be returned to [State

Farm's] customer and is most likely the common industry practice," appellee's brief at 11, no evidence in the record supports this statement. In fact, State Farm's letter requests that Chorpenning "be directed to pay restitution to State Farm in the amount of $18,886.89 and to our insured for his/her deductible of $500.00." State's Exhibit C (emphasis added). As State Farm suffered actual damages in the amount of $18,886.89, and the insured suffered actual damages in the amount of $500.00, we remand with instructions that the trial court correct its restitution order to award restitution to State Farm and its insured in these amounts.

Conclusion

We conclude Chorpenning has failed to demonstrate that his sentence is inappropriate and affirm his sentence. We reverse the trial court's restitution order and remand with instructions that the trial court correct its order consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and MAY, J., concur.